

CASE NO. 16-60367

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**ACUITY SPECIALTY PRODUCTS, INCORPORATED,
doing business as Zep, Incorporated,**

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

**ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD, 32-CA-75221, 32-CA102838**

**REPLY BRIEF OF PETITIONER/CROSS RESPONDENT
ACUITY SPECIALTY PRODUCTS, INCORPORATED,
doing business as Zep, Incorporated**

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I. INTRODUCTION

Acuity Specialty Products, Inc., d.b.a. Zep, Inc. (“Zep”) respectfully submits this Reply to the brief filed by Respondent/Cross Petitioner the National Labor Relations Board (the “Board”) on December 19, 2016 (“NLRB Brief”). For the reasons set forth below and in Zep’s opening brief, the Court should grant Zep’s Petition for Review of the Board’s May 16, 2016 Decision and Order (“Order”) and deny the Board’s Cross-Application for Enforcement.

The Board concedes that no panel of this Court may enforce the Board’s finding that Zep unlawfully included a class action waiver in its “Alternative Dispute Resolution Policy and Agreement for Disputes between a Sales Rep and Acuity Specialty Products, Inc. doing business as Zep Sales and Service” (“ADR Policy”). Given this Court’s numerous decisions regarding the lawfulness of class action waivers in arbitration agreements over the past four years,¹ the Board’s decision regarding this issue may be enforced only if this Court revisits the issue *en banc* or is reversed by the United States Supreme Court. (NLRB Brief at 10, 14, 23.)

Because the ADR Policy’s class action waiver was lawful, there was nothing unlawful about Zep moving to enforce the ADR Policy to compel arbitration

¹ See *D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), *Murphy Oil, USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), *Citi Trends, Inc. v. NLRB*, No. 15-60913, 2016 WL 4245458 at *1 (5th Cir. Aug. 10, 2016), *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613 (5th Cir. 2016).

against Charging Parties Heffernan and Woodford in litigation they filed in the United States District Court for the Northern District of California. Zep argued in its opening brief that this Court should reverse the portion of the Board's Order finding otherwise, and the Board did not even address the issue in its Brief. The Board, therefore, waived the issue. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 594 (5th Cir. 2006) (arguments not raised in brief are waived); *N.L.R.B. v. Seaport Printing & Ad Specialties, Inc.*, 589 F.3d 812, 816 (5th Cir. 2009) (issue waived where not briefed); *Scher v. Deutsche Bank Trust Co.*, 634 F. App'x 435, 439 (5th Cir. 2015).

The only issue remaining before this Court, therefore, is whether the ADR Policy can reasonably be construed as barring employees from filing unfair labor practice ("ULP") charges with the Board. For the reasons set forth below and in Zep's opening brief, it cannot.

A. The ADR Policy Cannot Reasonably be Interpreted as Barring Employees from Filing ULP Charges with the Board.

The ADR Policy expressly states that matters within the jurisdiction of the NLRB are not Covered Claims subject to arbitration. (ROA. 90-111.) Despite this clear and unambiguous language, the Board implausibly contends that employees could reasonably construe the ADR Policy as prohibiting filing ULP charges with the Board.

The Board begins its argument by noting that, in determining how a workplace rule could reasonably be interpreted by employees, “the Board reads the rule from the position of non-lawyer employees.” (NLRB Brief at 16 citing *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), enforced mem. 255 F. App’x 527 (D.C. Cir. 2007).) This much is not controversial.

The Board then highlights two aspects of the ADR Policy that the Board contends would lead an employee to construe the Policy as prohibiting filing ULP charges, despite the ADR Policy expressly stating the opposite. First, the Board highlights, the ADR Policy includes a variety of “covered claims,” including “violations of any ... federal statute,” and the Board argues that this broad category could encompass “subject[s] of unfair-labor-practice charges before the Board.” (NLRB Brief at 17-18.) Second, the Board highlights, the ADR Policy covers “claims of violations of ... The Taft Hartley Act,” which, the Board contends, is “integral to the NLRA.” Therefore, the Board argues, employees could believe they are precluded from filing ULP charges with the Board. (*Id.* at 18, 22.)

Neither of the Board’s arguments have merit. Regarding the Board’s first argument, concerning the ADR Policy’s inclusion of “violations of any ... federal statute” as “covered claims,” in *Murphy Oil, USA v. NLRB*, this Court rejected the Board’s position that a nearly identical provision made an arbitration policy unlawful. 808 F.3d 1013, 1019 (5th Cir. 2015). There, the arbitration agreement

provided that “any and all disputes or claims [employees] may have ... which relate in any manner ... to ... employment” must be resolved by individual arbitration, and signatories “waive their right to ... be a party to any group, class or collective action claim in ... any other forum.” *Id.* Despite the broad language, which the Board argued could encompass subjects of ULPs, this Court found that employees could not reasonably construe the policy as prohibiting them from filing ULP charges because the policy expressly stated the opposite. *Id.* at 1020.

Likewise, here, despite the ADR Policy’s general language regarding violations of federal law, it specifically permits employees to file ULP charges with the Board. Therefore, as this Court found in *Murphy Oil*, “[r]eading the [ADR Policy] as a whole, it would be unreasonable for an employee to construe the [ADR Policy] as prohibiting the filing of Board charges when the agreement says the opposite.” *Id.*

The Board’s second argument, regarding the “Taft Hartley” provision, fares no better. As a preliminary matter, the Taft-Hartley Act, another name for the Labor Management Relations Act of 1947, focuses on restricting certain conduct by unions. *See generally* John E. Higgins, Jr., *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, Chapter 3 (6th Ed. 2012). Therefore, requiring employees to submit to arbitration claims arising under the Taft-Hartley Act would not preclude employees from filing ULP charges with the Board. Of note, the Board does not contend otherwise; it alleges only that

employees could misconstrue the “Taft Hartley” provision as restricting NLRA Section 7 rights, not that the provision in fact restricts those rights.

As for whether employees would (mistakenly) reasonably construe the “Taft Hartley” provision, the Board’s argument relies on multiple untenable speculations. First, it requires imagining that a non-lawyer employee would have any idea what the Taft-Hartley Act is, including that it has something to do with the NLRA. This is particularly unlikely given: (1) the Taft Hartley Act is a relatively esoteric statute that is not in common vernacular, and (2) the Taft-Hartley Act is another name for the Labor Management Relations Act, *not the NLRA*. Alternatively, the Board’s argument must postulate that an employee would research the Taft-Hartley Act. Second, the Board must speculate that the hypothetical employee knows enough (or researches enough) about the Taft-Hartley Act to connect it to the NLRA, but does not know or research enough to understand that it does not address potential ULP charges against an employer that an employee would file with the Board.

Given the unlikelihood of either of the above postulates, let alone both, it is noteworthy that Charging Parties Heffernan and Woodford signed the ADR Policy and yet brought the instant ULP charge before the Board, and they did not suffer any adverse action by Zep for having done so. (ROA. 9 ¶ 29.) Further, nowhere in

the record is there any indication that any employee misinterpreted the ADR Policy as the Board suggests.

In sum, the Board must overcome a high bar if it seeks to assert that an agreement could be reasonably construed as precluding employees from filing ULP charges when the agreement expressly says the opposite. Rather than meet its burden, the Board relies on nothing but speculation, which the Board's own case law rejects as insufficient. *See Lafayette Park Hotel*, 326 NLRB 824, 826 (NLRB 1998) (where maintenance of a rule "has no more than a speculative effect on employees' Section 7 rights," it is too attenuated to warrant a finding of a violation). For these reasons, and those in Zep's opening brief, Zep respectfully requests that this Court grant its Petition for Review and decline enforcement of the Board's May 16, 2016 Order.

Respectfully submitted,

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Dated: January 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2017, I caused to be served a true and correct copy of Petitioner Acuity Specialty Products, Inc. d/b/a Zep Inc.'s Reply Brief via the Court's electronic case filing system which will automatically serve the following counsel of record for Respondent, National Labor Relations Board:

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